Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1634

RITCHIE LEE BLAKE,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

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PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

The petitioner, Ritchie Lee Blake, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeal of the State of California rendered in these proceedings on October 14, 1975.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division One, unreported, appears at Appendix B, infra. The Supreme Court of the State of California denied a

petition for a hearing and said denial appears at Appendix A.

JURISDICTION

The order denying the petition for a hearing was entered on December 24, 1975. (See Appendix A). On March 12, 1976, petitioner applied for an extension of time within which to file this Petition for a Writ of Certiorari. On March 15, 1976, Associate Justice William H. Rehnquist ordered that the time for filing this Petition be extended to and including May 10, 1976. The jurisdiction of this Court is invoked under 28 USC §1257(3).

QUESTIONS PRESENTED

The District Attorney of Humboldt County, State of California, presented the matter of the death of Mr. Jerry Marshall to the Humboldt Grand Jury which returned an indictment against the petitioner, Ritchie Lee Blake, charging him with First Degree Murder (California Penal Code §187), Kidnapping (California Penal Code §207) and First Degree Burglary (California Penal Code §459) on March 21, 1973. The petitioner was tried by a jury in Humboldt County and was found guilty of all three charges. The questions arising out of said conviction are:

1. Whether the action of the Trial Court in instructing the jury that it could find the petitioner guilty of First Degree Murder based on California's Felony Murder rule (California Penal Code §189) where the felony alleged was burglary and the death occurred several miles from the site of the burglary and at a later time was an unforeseeable and retroactive expansion of narrow and precise statutory language and thus violative of the due process clause of the 14th Amendment.

2. Whether the failure of the prosecution to supply the petitioner with pretrial statements of eyewitnesses until these witnesses testified and the failure to provide the petitioner with information that one of these witnesses was stopped by Humboldt County Sheriffs for possession of marijuana during the course of the trial denied the petitioner the right to be informed of the nature of the charges against him.

3. Whether the Trial Court's allowance of Mathew James to testify when Mr. James stated that as a result of a severe head injury he had no recollection of the incident in question unless he studied his prior statements, the Court's subsequent instruction that he study these statements, and his subsequent studying and coaching by the prosecution denied the petitioner the ability to confront his accusers.

4. Whether the Trial Court's denial of petitioner's motion for a change of venue denied petitioner the right to a trial by a fair and impartial jury.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, §10:

"No State shall . . . pass any . . . ex post facto law . . ."

Constitution of the United States, Amendment XIV, §1:

". . . nor shall any state deprive any person of life, liberty or property without due process of law."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions the accused shall enjoy the right . . . to a speedy and public trial, by an impartial jury . . ."

STATEMENT OF FACTS

Petitioner Ritchie Lee Blake was arrested along with Mathew James, Gaylord Dowd and Milton Dowd, and all were accused of the burglary of the Club Hupa, on the Hoopa Indian Reservation, Humboldt County, State of California, kidnapping and murdering the janitor of the Club Hupa.

The District Attorney allowed Mathew James, Milton Dowd and Gaylord Dowd to plead guilty to Second Degree Burglary with County Jail time in return for their testimony against the petitioner.

Testimony of Accomplices

The testimony of these three presented the story that on January 10, 1973, the petitioner and the witnesses had been drinking whiskey and Coke since the early afternoon. Just before midnight the petitioner went to the Club Hupa to obtain more whiskey. He returned to where the other gentlemen were and informed them the bar was closed. They decided to go to the club for whiskey nonetheless. They arrived at the club and found the deceased, Jerry Marshall, burning trash. The petitioner and Gaylord Dowd spoke with Mr. Marshall and Gaylord Dowd went into the opened back door of the Club Hupa and began removing liquor. He put the liquor in the car and took the petitioner's rifle with him. The petitioner and Milton Dowd removed liquor from the bar. The petitioner ordered Mr. Marshall into the back seat of the car and then he and Milton Dowd got into the car. They drove several miles to the Bald Hills area and stopped near a "log skid road." All of the occupants got out of the car. Gaylord Dowd saw the petitioner raise his rifle, he turned and returned to the car and he heard a shot. Milton Dowd testified he saw Mr. Marshall fall and the petitioner approach Mr. Marshall and then he heard another shot. The petitioner returned to the car carrying a case of beer and his rifle. He stated that he had killed Marshall.

This is the substance of the eyewitness testimony as to the burglary, kidnapping and first degree murder, the opinion of the Court of Appeal goes into much greater detail and is located at Appendix B, pp. ii-vi.

The Trial

The petitioner moved the Trial Court for a change of venue. The motion was denied and petitioner sought a writ of mandamus from the Court of Appeal of the State of California, First Appellate District, in case 1 Civil No. 33330, which was denied, and a petition for hearing in the Supreme Court of California was also denied.

The trial commenced on Monday, December 3, 1973.

On Wednesday morning, December 5, 1973, Mathew James took the stand. He stated that because of a serious brain injury, suffered in 1967, and the resulting brain surgery that followed, his memory was faulty and he could not remember anything for very long. Even though the District Attorney's office had prepared Mr. James for his testimony, he said that only after going over something for four or five times could he remember it. After admonishing him in regard to the provisions of the Penal Code that relate to perjury, the Court ordered Mr. James to listen to a reading by District Attorney Investigators and Sheriff's Officers of what purported to be his prior statements and testimony. He also listened to part of a tape of a polygraph test that had been administered to him. This lasted from 1:30 to 6:30 in the evening.

This was the first time that the defense discovered the existence of two statements made by Mr. James and of the tape recording of the polygraph examination. These contained three varying versions of his testimony.

Mr. James was called the next morning, but his memory was not refreshed. The Court ordered him to stay close by until he was returned to the witness stand. He spent that day in the District Attorney's office by Court order. The District Attorney then put on Milton Dowd, at which point the defense was informed about the statement Milton had made to a Deputy District Attorney and an investigator. Later in the trial the defense discovered that they had also been denied access to a statement made by Gaylord Dowd. The Court allowed the prosecution to use these statements in Court and imposed no sanction upon the prosecution for its failure to comply with the Court-ordered discovery.

At the conclusion of the trial the judge instructed the jury as to the law on which they should base their decision. This included a burglary instruction that "the act of fleeing with the fruits of the burglary to a place of temporary safety and the acts done in the same continuous transaction to protect the discovery of said burglary, are all an integral part of the crime of burglary." Over objection of the petitioner the jury was instructed as to the felony-murder rule. The jury returned a verdict of guilty against the petitioner as to all three counts.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IN ALLOWING THE FELONY-MURDER INSTRUCTION WAS AN UNFORESEEABLE AND RETROACTIVE EXPANSION OF THE STATUTE WHICH CONFLICTS WITH THE DUE PROCESS PRINCIPLES ENUNCIATED IN BOUIE v. CITY OF COLUMBIA.

In *Bouie v. City of Columbia* (1964) 378 U.S. 347, this Court held that the due process clause of the 14th Amendment requires that the criminal law must have existed when the conduct in issue occurred and that a judicial enlargment of a criminal law by interpretation in an unexpected manner must not be given retroactive effect. As the state's legislature is barred by the Ex Post Facto Clause (Art. I, §10) from enacting such a law this Court held that the Due Process Clause bars the State's courts from achieving the same end by judicial construction. It is the petitioner's position that the courts of the State of California have, in this case, given an interpretation to the felony murder rule which goes considerably beyond the statutory language and establishes a new and much broader rule of law and that this interpretation was given retroactive effect.

California Penal Code §189[1] provides in part that "all murder which is committed in the perpetration

[1]All murder which is perpetrated by means of a destructive device or explosive, poison, lying in wait, torture, or by any other kinds of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

As used in this section, "destructive device" shall mean any destructive device as defined in Section 12301 and "explosive" shall mean any explosive as defined in Section 12000 of the Health and Safety Code.

of or attempt to perpetrate . . . burglary . . . is murder of the first degree." A homicide which occurred during the perpetration or attempted perpetration of a kidnapping is not included within the First Degree felony-murder definition.

The Instruction given by the Humboldt County Superior Court and upheld by the Court of Appeal and the California Supreme Court is:

> "If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of burglary, all persons who either directly and actively commit the act constituting such crime or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, are guilty of murder of the first degree, whether said killing is intentional, unintentional, or accidental."

The petitioner objected to the giving of this instruction on the grounds that the homicide did not occur during the perpetration of a burglary as defined by California law.

California Penal Code §459 defines burglary[2] as being committed by "Every person who enters any . . . store . . . with intent to commit grand or petit larceny or any felony . . ." This code section was

[2]Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach as defined by the Vehicle Code, vehicle as defined by said code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

enacted in 1872 and has undergone very little change since that date. Flight from the scene of the crime is not, and never has been, a part of the crime of burglary. The Court of Appeal does not state that burglary includes flight as there is a long line of decisional law holding that burglary is a fixed locus crime. Burglary was originally simply a crime against habitation and was expanded by the legislature to include other forms of property. Neither escape nor flight are within the res gestae of burglary.

The Court's ruling holds that the homicide need not occur within the res gestae of either the burglary or the felony which the accused intended to commit when he entered the store. This is a departure from the prior law of the State of California. The cases in the past have held that Homicide is committed in the perpetration of a felony if the killing and the felony are parts of one continuous transaction (*People v. Nixon* (1949) 33 Cal.2d 688, 203 P.2d 748; *People v. Cartier* (1960) 54 Cal.2d 300, 5 Cal.Rptr. 573, 353 P.2d 53.

The killing in this case occurred in the course of a kidnapping and after the burglary of the Club Hupa was complete.

A kidnapping and a burglary are not to be considered as one transaction under California law (*People v. Brown,* 29 Cal.2d 555, 176 P.2d 929; *People v. Dorman,* 28 Cal.2d 846, 172 P.2d 686; *People v. Hall* (1973) 34 Cal.App.3d 834, 110 Cal.Rptr. 440. See also Witkin, *California Crimes,* pp. 74-77, "Single Act or Transactions" §70-74). This ruling has altered the

California law in that it no longer requires that the homicide be committed within the res gestae of either the burglary or the underlying felony. What apparently is California law now is that the felony-murder instruction is applicable if there has been a burglary and during the same night someone who happened to be at the site of the burglary was killed by one of the burglars.

The rule of law which existed in California prior to this decision was also recognized by her sister states. The Colorado Supreme Court expressed its rule in regard to felony-murder relying, in part, on California law in *Bizup v. People,* 150 Colo. 214, 371 P.2d 786 (1962). It stated:

> "'When the homicide is within the res gestae of the initial crime and is an emanation thereof, it is committed in the perpetration of that crime within the meaning of the [felony murder] statute.' *State v. Turco,* 99 N.J.L. 96, 122 A. 844; *People v. Nixon,* 33 Cal.2d 688, 203 P.2d 748; *State v. Forequette,* 67 Nev. 505, 221 P.2d 404, 128 So.2d 132 (Fla. 1961) . . ." (371 P.2d at 789).

The Nevada Supreme Court also stated:

> "Faced with the problem of determining when the underlying felony terminated for the purpose of applying the felony murder doctrine, the courts have generally spoken in terms of the res gestae of the crime . . ." (*Payne v. Nevada* (1965) 406 P.2d 922.

Though these cases have force or effect on California law the *Bizup v. People,* supra, citation does indicate that the present case is a drastic departure

from what other states had interpreted California law. This California decision is unique in disregarding the res gestae of the crime as the determining factor of when the underlying felony has terminated. It is this type of judicial determination that is not to be applied retroactively under the *Bouie v. City of Columbia,* supra, interpretation of the Due Process Clause of the 14th Amendment. The application of this new rule of law in this case is retroactive and inconsistent with the due process clause.

II. FAILURE TO PROVIDE EYEWITNESS PRETRIAL STATEMENTS AND INFORMATION OF APPREHENSION OF AN EYEWITNESS ON A DRUG CHARGE DENIED THE PETITIONER HIS RIGHT TO BE INFORMED OF THE NATURE OF THE CHARGES AGAINST HIM.

Inherent in even the most narrow view of the Due Process Clause of the 14th Amendment is the right to know of adverse evidence and the opportunity to rebut both its truth and its relevance (*United States v. Owens* (8 Cir. 1969) 415 F.2d 383). This Court has held the right to pretrial discovery to be applicable to the states through the Due Process Clause and in the Sixth Amendment's requirement that a criminal defendant be informed of the nature of the charge against him. (*Argersinger v. Hamlin* (1972) 92 S.Ct. 2006, 407 U.S. 25, 32 L.Ed.2d 530).

The failure of the prosecution to provide all of the written statements by witnesses is not always a denial of due process, however. (*Moore v. Illinois* (1972) 92 S.Ct. 2562, 408 U.S. 786, 33 L.Ed.2d 706, rehearing denied, 93 S.Ct. 87, 409 U.S. 897, 34 L.Ed.2d 155). Due process is not denied when the information is of such limited value as there is no reasonable likelihood that even if it were produced when required that it would have affected the judgment of the jury.

The fact that the evidence was not produced because of negligence on the part of the prosecution rather than the intentional suppression of such evidence by the prosecution is not the deciding factor. (*Rice v. Vincent,* 491 F.2d 1326 (2nd Cir. 1974) cert. denied, 95 S.Ct. 144, 419 U.S. 880, 42 L.Ed.2d 120). Certainly, where there is misconduct on the part of the prosecution there is greater reason to require a new trial; however, where the evidence denied the defendant would reasonably have resulted in a different verdict being returned the conviction must be reversed even if the prosecution's action was only negligent or passive.

The evidence denied the petitioner here was substantial. Three pretrial statements made by eyewitness Mathew James which contained varying accounts of the alleged burglary, kidnapping and murder were not turned over to the petitioner at any time prior to the trial. (Reporter's Transcript page 217). The petitioner would have never been aware of the existence of these statements if the prosecution had not been forced to use them during the trial to attempt to refresh Mr. James' memory as to what occurred. Up to this point the petitioner did not know the nature of the accusation against him in that he had knowledge of only one of the various stories Mr.

James had told the prosecution. The prosecution offered no explanation for this failure to provide discovery.

It should further be noted that the failure to provide the petitioner with these statements was in violation of a discovery order made by the Superior Court of the State of California in and for the County of Humboldt.

There was other discovery that the prosecution, without explanation, failed to provide the petitioner. Statements from the other two eyewitnesses, Milton Dowd and Gaylord Dowd, were kept from the petitioner until they testified. (Reporter's Transcript page 429).

At the hearing in the Superior Court on the petitioner's motion for a new trial two Humboldt County Sheriff's officers testified that on January 2, 1974, an automobile driven by Milton Dowd was stopped for a traffic infraction (Augmented Reporter's Transcript page 25). The officers searched the automobile and found marijuana in the automobile. Mr. Dowd's sister, Gloria Vigil, also a witness for the prosecution in the case against the petitioner, was called in order that she could retrieve Mr. Dowd's automobile. The officers cited Mr. Dowd for a traffic violation and allowed him to leave with Mrs. Vigil.

An integral part of the petitioner's defense was that through the use of drugs and alcohol on the night in question the petitioner had a diminished capacity which under California law can negate each essential element which must be found prior to a

finding of malice necessary for a conviction for first degree murder without the benefit of the felony murder doctrine (*People v. Podder* (1974) 10 Cal.3d 750, 111 Cal.Rptr. 910, 518 P.2d 342). The Superior Court instructed the jury as to this doctrine (Clerk's Transcript page 73).

The prosecution and especially the eyewitnesses, Mathew James, Milton Dowd and Gaylord Dowd, had indicated that alcohol was used by them the night of the burglary, and evidence of the use of marijuana was introduced to the jury. The discovery of marijuana on one of the prosecution's eyewitnesses during the course of the trial would have substantially aided the petitioner in his defense of diminished capacity as it tends to indicate the frequency of use of that drug by those who participated in the burglary of the Club Hupa. The petitioner did not discover this until after the verdict was returned.

At the hearing on the petitioner's motion for a new trial the officers testified that they told no one in the Sheriff's Office or in the Office of the District Attorney about the discovery of marijuana. The officers utilized their rights against self-incrimination and refused to testify as to any aspect of this stop except to state that such a stop was made (Reporter's Augmented Transcript, Officer Deaner, p. 28, line 8, and Officer Hughes, p. 28, lines 17-18, p. 29, line 4).

From the population of Humboldt County, approximately 104,000, and the limited news media (see Appendix B, p. xiii) it can be assumed that two members of the Sheriff's Office were well aware that Mr. Mil-

ton Dowd was an essential prosecution witness in a major felony case. This was a deliberate and unjustified denial of evidence which was properly discoverable by the petitioner.

This Court has held that a prosecution office is a single entity, and what is known to one prosecutor is imputed to all the members of the office. (*Giglio v. United States* (1972) 92 S.Ct. 763, 405 U.S. 150, 31 L.Ed.2d 104. This has been extended to include the area of discovery (*Rice v. Vincent,* supra).

This Court has never held, however, that the single entity rule should apply to the police authorities. (*Rose v. State* (5th Cir. 1973) 474 F.2d 1150, rehearing denied March 12, 1973, 94 S.Ct. 141, 414 U.S. 850, 38 L.Ed.2d 98). Where there has been deliberate and unjustified activity by the police authorities which has prejudiced the criminal defendant and has denied the criminal defendant due process there should be a retrial of the matter in order to mitigate the effects of the police misconduct. The fact that the misconduct was perpetrated by police officers on patrol should not have any bearing on the outcome. They were acting as officers of the State and have deliberately denied the petitioner his due process.

In conclusion, the prosecution and the police both failed to provide the petitioner with the information required by both the Due Process Clause of the 14th Amendment and the Superior Court's discovery order. Because of this denial there is a reasonable likelihood that if discovery had proceeded as intended the

jury's verdict would have been different. The imposition of sanctions against the prosecution for failure to provide discovery is the only manner in which the courts will ever be able to insure that the prosecution will make a sincere effort to provide the discovery. The Superior Court had the ability to grant a continuance after the five pretrial statements of the eyewitnesses were made available to the petitioner or grant a new trial when the deliberate coverup of Mr. Milton Dowd's possession of marijuana came to light. However, Trial Courts are reluctant to and have consistently failed to provide any sanctions against dilatory prosecutors. (*Toward Effective Criminal Discovery in California: a Practitioner's View,* Ephram Margolin, 56 Cal. Law Rev. 1040). This important right needs the imposition of some remedy when it is denied. As this is the Court which has provided for the right, this should also be the source of the remedy when it is denied a criminal defendant.

III. ALLOWING MATHEW JAMES TO TESTIFY DENIED THE PETITIONER THE ABILITY TO CONFRONT HIS ACCUSERS

Mathew James had suffered a very serious head injury in an automobile accident in 1967. He was unconscious for a month following the accident and had brain surgery to alleviate a blood clot. As a result, he presently has a plate implanted in his skull and he continues to suffer from headaches and dizziness

and his memory is impaired. (Reporter's Transcript pages 212, 213 and 469).

When initially called by the prosecution to testify, Mr. James stated:

> "I can't remember since I had a head injury in a car accident, and its been so long ago I don't hardly remember, ever since I had that car accident I can't hardly—I can't remember . . .
>
> "I can only remember something if I study it and go over it four or five times, and get it in my head."
>
> (Reporter's Transcript page 180).

Later, in the judge's chambers, he informed the Court that:

> "Well, I can't remember, if I studied it, go over it, I get it in my head."
>
> (Reporter's Transcript page 191).

Under Order of the Court Mr. James was read what purported to be his earlier statements by members of the Sheriff's Office and the District Attorney's Office. This occurred from 1:30 to 6:30 on December 5, 1973 (Reporter's Transcript pages 202-203).

The following morning Mr. James was presented in the judge's chambers to see if his memory had been refreshed. The District Attorney asked if he remembered his statement to the police and if what was read to him was in fact that statement. Mr. James stated:

> "I guess; I don't know, because I can't remember what happened."
>
> (Reporter's Transcript page 216).

Next Mr. James was asked if the preliminary examination transcript was true. Mr. James stated:

> "Well, I don't know; I guess, like I said before."

Then the District Attorney asked if the tape recording was true and if Mr. James remembered the interview; to which Mr. James stated:

> "I guess."
>
> (Reporter's Transcript page 217).

When Mr. James did retake the stand he was not testifying from his memory of January 10 and 11, 1973, but of what he had been read and forced to memorize.

By allowing Mr. James to thus testify the petitioner was limited to cross-examining him as to what the prosecution had had him memorize. The petitioner could not cros-examine Mr. James as to what actually occurred on January 10 and 11, 1973, but was confined to what the prosecution had recorded as his earlier statements.

The right to cross-examination is fundamental to the criminal justice system and is obligatory on the states by the Due Process Clause of the 14th Amendment (*Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065 (1965)).

In *Pointer v. Texas, supra,* this Court held that the introduction of the transcript from the preliminary examination where the defendant did not have the opportunity to cross-examine the witness denied the defendant his right to confrontation and the convic-

tion was reversed. The statements read to Mr. James, and the statements which he studied were not taken down originally under circumstances which afforded the petitioner an opportunity to cross-examine Mr. James. This was the source of Mr. James' testimony, not his independent recollection of events. As the petitioner did not have the ability to cross-examine Mr. James when he made these statements he was, like Pointer, denied the right of confrontation.

If the statements themselves were to be introduced into evidence a foundation would have to be laid as to each statement. No foundation was laid by the prosecution. The jury was never informed that Mr. James was testifying from memorized statements but was misled into believing he was testifying from his independent recollection of the events of January 10 and 11, 1973. This violated the purpose of the Confrontation Clause as stated in Justice Steward's opinion in *Dutton v. Evans,* 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970) quoting from *Green v. California,* 399 U.S. 149, at 161, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), "a practical concern [of the Confrontation Clause is] for the accuracy of the truth determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the former statement.'"

The trier of fact had a false basis upon which to evaluate the truth of Mr. James' testimony and since Mr. James was testifying from memorized statements which he could not remember making, the petitioner was prevented from testing the accuracy of these

statements. It is for these reasons that petitioner asserts the violation of the Confrontation Clause and the denial of Due Process and requests this Court to grant a Writ of Certiorari to review the ruling in this matter.

IV. THE DENIAL OF PETITIONER'S MOTION FOR A CHANGE OF VENUE RESULTED IN THE DENIAL OF A TRIAL BY A FAIR AND IMPARTIAL JURY.

In *Duncan v. Louisiana* (1968) 88 S.Ct. 1444, 391 U.S. 145, 20 L.Ed.2d 491, this Court held that right of a criminal defendant to a trial by a fair and impartial jury was obligatory on the states.

The Due Process Clause of the 14th Amendment requires that the criminal defendant be tried by a jury panel which is both impartial and indifferent to the outcome. (*Irvin v. Dowd* (1961) 81 S.Ct. 1639, at 1642, 366 U.S. 717 at 722, 6 L.Ed. 1961; *Murphy v. Florida* (1975) 95 S.Ct. 2031, 421 U.S. 794, 44 L.Ed. 2d 589.

In the *Irvin v. Dowd,* supra, decision this Court found that where the setting of the trial was inherently prejudiced the criminal defendant would be denied due process if venue were not changed to a place which was not inherently prejudicial.

Humboldt County, the place of this trial, is a rural county and the site of the largest Indian reservation in the State of California. (See *Mattz v. Arnett* (1973) 93 S.Ct. 2245, 412 U.S. 481, 77 L.Ed.2d 92, and *Short v. United States* (1973) 486 F.2d 561, 212 Ct.Clms 870). The burglary was committed at the

Club Hupa, the first liquor store or bar ever allowed on the reservation. There was considerable evidence introduced concerning the consumption of alcohol and drugs by the petitioner, a resident of the Hoopa Reservation and a member of the Hupa Tribe.

The California Court of Appeal has held that it was impossible to impanel an impartial jury in Humboldt County in a first degree murder case where the publicity was similar to that of the petitioner's case (*Clifton v. Superior Court* (1970) 7 Cal.App.3d 245, 86 Cal.Rptr. 612). The defendant in the Clifton case was not a native American but was rather a member of a local motorcycle club.

The climate in the community against the petitioner is evidenced in the record at least in three separate instances. There was an apparent attempt at the intimidation of Milton Dowd and Gaylord Dowd which required the Court to instruct the Sheriff that "if he needs more assistance down here, to have the Sheriff clear out the hallways and make sure that nobody is intimidating these witnesses out in the corridor." (Reporter's Transcript page 294). Secondly, the defense counsel was forced to ask the Court for an order halting intimidation being carried on by the Sheriff's Office against defense witnesses.

The third instance should, in itself, require the reversal of the conviction. Margaret D. Hooker stated in an affidavit filed by the District Attorney in opposition to the petitioner's motion for a new trial:

> "During the month of January, 1974, I was approached by a male person whose name is not known to me, who ventured an opinion that defendant *Ritchie Lee Blake was guilty,* that it was common knowledge among the school children of the Hoopa area *that Blake had acknowledged his responsibility.*" (Italics added).
>
> (Clerk's Transcript page 169)

She did not make this communication known during the trial when an alternate could have replaced her. This came to the attention of the Court in the Declaration of John D. Kinones, filed by the appellant. Mr. Kinones was also a juror in this matter and had overheard Mrs. Hooker state, after the verdict had been rendered, that "she knew something about this case that would turn around the whole trial." (C.T. 163-164).

The appellant moved for a new trial based on Mrs. Hooker's reception of information that Ritchie Lee Blake "had acknowledged his responsibility" and that she considered this information to be of such value that it "would turn around the whole trial." This motion was heard on March 29, 1974 before the Honorable D. H. Wilkinson, Judge of the Superior Court of the State of California, County of Humboldt, and the Court found that "there was no misconduct on the part of the juror, Mrs. Hooker, or any other juror."

Mrs. Hooker had been informed of an alleged confession made by the appellant and that even the school children in her own community of Hoopa, knew the appellant was guilty.

Mrs. Hooker had, as all jurors had in this matter, been continually admonished that she should not speak with anyone in regard to this criminal case. Under Penal Code §1120, she was required to inform the Court of the knowledge that she had acquired. As a matter of common sense, a juror who is informed of an alleged confession made by the defendant should inform the judge of the reception of such information.

When a juror receives outside information in regard to a criminal case there is jury misconduct and this raises a rebuttable presumption that the defendant has suffered prejudice.

> "In a criminal case, *any private communication,* contact or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." *Remmer v. United States* (1954) 74 S.Ct. 450, 451, 347 U.S. 227, 98 L.Ed. 654. See also 13 Hastings L.J. 432; 5 Wharton 304; 22 ALR 103; 62 ALR 1466; 41 ALR 2d 227.

This standard has been held applicable to the states as to officers in charge of jurors in *Turner v. Louisiana* (1965) 85 S.Ct. 546, 379 U.S. 466, 13 L.Ed.2d 424 (overruling a decision by the Louisiana Supreme Court) and in *Parker v. Gladden* (1966) 87 S.Ct. 468, 385 U.S. 363, 17 L.Ed.2d 420 (overruling a decision by the Oregon Supreme Court). In *Turner,* supra,

this Court abandoned the test of actual prejudice in cases involving the officers in charge of jurors, and held such misconduct is prejudicial per se.

Although this does not involve any comments by officers of the Court the rule of law both under state law and Federal Constitutional guarantees: Where there has been communication with a juror about a matter presently before the jury there is a rebuttable presumption of prejudice.

The Trial Court had before it no evidence that could rebut this presumption. Statements of the effect that the additional information had upon the reasoning of Mrs. Hooker is not admissible evidence under the rule, *People v. Hutchinson* (1969) 71 Cal.2d 342, 349, 78 Cal.Rptr. 196, 200, 455 P.2d 132, 136. It was held there that no evidence is admissible to show the *effect* of such statements under Evidence Code §1150.

Thus we have a rebuttable presumption of prejudice with no evidence to contradict it. Hence, any presumption of prejudice becomes conclusive rather than rebuttable.

Hence this Court is urged to grant the writ of certiorari to review the California Court's holding which found no misconduct and no prejudice to the petitioner.

As to the issue of the change of venue, all of these difficulties would have been avoided if the trial had taken place not tainted by the racial prejudices against native Americans as in Humboldt County and not exposed to the publicity which a trial of this magnitude generates in a small rural community.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal for the State of California.

Dated, May 7, 1976.

Respectfully submitted,
ROBERT C. DUNN,
Attorney for Petitioner.

(Appendices Follow)

APPENDICES

Appendix "A"

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
Dec. 24, 1975

Received
Dec. 29, 1975
Robert C. Dunn
Attorney at Law

I have this day filed Order

Hearing Denied

In re: 1 Crim. No. 13249

People

vs.

Blake

Respectfully,

G. E Bishel
Clerk

Appendix "B"

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Crim. No. 13249

(Sup. Ct. No. 7075)

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
RITCHIE LEE BLAKE,
Defendant and Appellant.

[Filed Oct. 14, 1975]

OPINION

Defendant appeals from the judgment upon a conviction of murder in the first degree (Pen. Code, §187, robbery in the first degree (Pen. Code, § 211) and burglary in the first degree (Pen. Code, § 499). None of the assignments of error has merit. We therefore affirm the judgment.

Facts

On January 12, 1973, the Humboldt County Sheriff's Office was informed by Arnold M. Ferris, manager of the Club Hupa and Club Hupa Liquors that Jerry Marshall was missing. Marshall was employed by Ferris as part-time janitor. Marshall often times performed his tasks after the bar had closed. He was retarded due to a disease he had contracted in infancy and was deaf in one ear due to an automobile accident. Marshall's body was found on January 22, 1973, by members of the Sheriff's office.

In the afternoon of January 10, 1973, Milton Dowd (hereinafter "Milton"), Matthew James and defendant drank whiskey and coke at defendant's house. Some time later they got into James' car. Defendant brought a .22 caliber rifle with him. The three men went to the Club Hupa where they purchased more whiskey. They then drove around the area and started consuming the whiskey and coke they had purchased. Later that evening the three men went to the home of Milton's sister and brother-in-law, Mr. and Mrs. Vigil. At the time they arrived the three men had consumed approximately one-half of the bottle of whiskey they had purchased. Gaylord Dowd (hereinafter "Gaylord"), Milton's brother, and Scott Weber were at the Vigil residence when the three men arrived. At about midnight defendant left to purchase more whiskey but returned 15 or 20 minutes later and told the others that the bar was closed. Defendant suggested going to the Club Hupa to obtain more whiskey.

Defendant, Milton, Gaylord and James went to the Club Hupa in James' car. James parked his car in the rear of the Club Hupa. Marshall was outside burning trash. The back door of the Club Hupa was open. Defendant and Gaylord got out of the vehicle and spoke to Marshall. Gaylord then went into the Club Hupa and began removing liquor from the premises. He did not offer to pay for any of the liquor. Marshall approached Gaylord, who pushed him away with his foot. Gaylord put the liquor in the car and at that time took defendant's rifle from him. Defendant and Milton entered the bar several times and took bottles of whiskey and cases of Coor's beer. While these events were taking place James remained in the car.

Gaylord handed the rifle to defendant and ordered Marshall to get into the back seat of the car. Gaylord entered the car and sat in the back seat. Defendant shut and locked the back door of the club. He and Milton got into the front seat of the car and James drove to the Bald Hills area. The car was stopped on Marshall Road and all the occupants got out of the car.

Milton retrieved some of the beer from the trunk. He was assisted by Marshall. They carried the beer down "log skid road." Defendant walked behind Milton and Marshall, carrying the rifle. Gaylord was behind defendant. James moved the car a few feet in order that the headlights would point in the direction of "log skid road." Milton left the road to hide the beer in the brush. At about this time Milton heard

his brother, Gaylord, shout at him and he also heard a shot.

Gaylord saw defendant raise his rifle, at which point Gaylord said to defendant "Hey, my brother is out there." Gaylord turned and started back toward the car when he heard a shot. As Milton was running back toward the car he saw Marshall fall to the ground and then saw defendant approach from a dark area to the side of the road. Defendant walked in the direction of Marshall and then Milton heard another shot.

James testified to the above episode as follows: He saw defendant kneel and aim his rifle. Gaylord then yelled at his brother to come back to the car. Next James heard two shots and saw Marshall fall to the ground. He saw defendant walk toward Marshall and shortly thereafter heard two more shots.

Defendant returned to the car carrying a case of beer and his rifle. He stated that he had killed Marshall to prevent him from going to the police. Defendant further stated that he would "take the rap" for the killing.

James drove from the Bald Hills area to Tish Tang Road where all the liquor except a few bottles of whiskey was put in the brush. The four men decided it was best to leave town and so at approximately 3:00 a.m. they went to the Vigil's residence where they siphoned gas from the truck of defendant's brother. They drove to Eureka where they went to Clarke's Motel. Milton aroused the manager around 5:00 a.m. and rented a room with accommodations

for four people for $10.50. The four men remained in the motel room until 10:00 or 11:00 a.m. the next morning. That night they drove back to Hoopa and went to their respective homes. A few days after the above incident Milton, James and defendant drove to the Bald Hills area, but left when a dog started to bark.

Defendant did not testify on his own behalf.

Pretrial Statements

Defendant argues that he was denied a fair trial because of the failure of the prosecutor to supply him with pretrial statements taken from James, Milton and Gaylord. The record discloses that defendant made a motion for discovery. The record also reflects that defense counsel was not given these statements prior to trial but that he did receive them during trial. Defendant argues that the three pretrial statements made by James contain three versions of the events surrounding the commission of the crimes charged. He does not contend that the statements given by the Dowd brothers are at variance or that they are inconsistent with other statements or with their testimony at trial.

"As a general rule, a defendant in a criminal case may, for purposes of impeachment, inspect the statements or recorded conversations of any witness whom the prosecution intends to call at trial." (Joe Z. v. Superior Court, 3 Cal.3d 797, 805.) The record reflects that at the trial James had difficulty remembering the events of the evening in question. Since his testi-

mony was already under attack it is doubtful that the defense would have been materially aided in demonstrating that James' prior statements were inconsistent with each other. As respects the statements given by the Dowd brothers it is not indicated by defendant how or in what manner their statements were beneficial to defendant. In any event defendant has failed to show that he was prejudiced in the preparation of the case by reason of the late disclosure of the statements. (People v. Cohen, 12 Cal.App. 3d 298, 324.)

In *People v. Ruthford,* 14 Cal.3d 399, 406, the Supreme Court held that in a criminal case the prosecution must disclose to the defendant all favorable substantial material evidence relating directly to guilt, punishment, or credibility of witnesses, whether or not the defendant requests the information. *Ruthford* holds, however, that the failure to make such a disclosure does not require a reversal per se. "The defendant must make a showing of substantial materiality and even after this showing is made reversal is not required if the prosecution establishes the failure to disclose was harmless beyond a reasonable doubt." (At p. 409.)

Defendant has the burden, therefore, of showing that the information that was withheld from him was of substantial materiality before the prosecution need show that the failure to produce such information was harmless beyond a reasonable doubt. He has made no such showing. We observe that on December 5, 1973, during the course of the trial, James' three

statements were read in the presence of defense counsel. James was called to the stand five days later. It appears, therefore, that defense counsel had ample time to consider such statements in order to determine their inconsistency with the testimony at trial and to utilize such statements for purposes of impeachment.

Testimony of Matthew James

Prior to his calling James to the stand the prosecutor furnished James with a copy of a pretrial statement given by James and a copy of the preliminary hearing transcript. James was also read another pretrial statement he had given. When James was called to the stand on December 5, 1973, he professed that he was unable to remember the events of January 10 and 11, 1973, blaming his lack of memory on a head injury he sustained in an automobile accident. Outside the presence of the jury James was told by the trial judge ". . . if you do remember these events and you give testimony contrary to what the facts are that you remember that you may then be subject to prosecution for perjury which could result in your incarceration in jail." Also outside the presence of the jury and in the presence of defense counsel, the court reporter, the prosecutor, two investigating officers and his mother, James was reread his statement, his testimony at the preliminary hearing and also listened to a tape recording of a polygraph test which he had previously undergone. The rereading of the statements and the playing of the tape recording took from 1:30 p.m. until 6:27 p.m.

The next morning the prosecutor questioned James outside the presence of the jury, and when the witness still stated that he was unable to remember the events in question the prosecutor abandoned his examination of James. The prosecutor then called the two Dowd brothers who testified to the events of January 10 and 11, 1973, in some detail. On December 10, 1973, James was again questioned outside the presence of the jury. At this time James stated that the rereading of the above-mentioned materials had refreshed his recollection "A little bit." James then stated he remembered most of the events in question, but that he could not remember anything until he stopped playing pool, but that he did remember playing pool and drinking.[1] James was th again called to the stand and after stating in the presence of the jury that he had difficulty remembering events he continued to testify in some detail to the events that occurred after he left the Vigil residence.

Defendant contends that James' testimony was erroneously received because he did not testify from his personal recollection but from studying and restudying statements he could not remember making. James' testimony was given over objection.

Section 702 of the Evidence Code provides that a witness must have personal knowledge of the facts to which he testified. "Personal knowledge" means a present recollection of an impression derived from

[1]Defendant, James and Milton had gone to the Vigil residence between 6:00 and 7:00 p.m. to play pool and had played pool until they left to go to the Club Hupa to obtain more whiskey.

the exercise of the witness' own senses. (2 Wigmore, Evid., § 657, at p. 762 (3d ed. 1940).) Section 170 of the Evidence Code defines the word "perceive" as meaning "to acquire knowledge through one's senses."

The question whether a competent witness has the ability to perceive and recollect with respect to the particular matter on which he testifies is a matter for the preliminary determination of the trial judge; its ultimate determination is for the jury. (People v. Blagg, 10 Cal.App.3d 1035, 1040; see Witkin, Cal. Evidence (2d ed. 1966) Witnesses, § 771, p. 718; Evid. Code, § 403, subd. (a)(2); and see Evid. Code, § 701; People v. Avery, 35 Cal.2d 487, 492.) In its comment to Evidence Code section 701, the Law Revision Commission notes that a court makes the determination whether the witness has the capacity to communicate and his understanding of the duty to tell the truth, and that if he has those capacities the determination whether he in fact perceived and does recollect is left to the trier of fact. The Comment observes that ". . . the court may exclude the testimony of a witness for lack of personal knowledge only if no jury could reasonably find that he has such knowledge."

In the present case it cannot be said that no jury could find that James lacked personal knowledge. The jury had before it James' testimony that he had some difficulty remembering events due to a head injury he suffered in 1967, and the jury was aware that James had been given a copy of his statement and a copy of the preliminary hearing transcript and that he had heard a tape recording of a polygraph test

prior to the first time he was called to the stand. Accordingly, the trial court properly left the final determination of the issue of James' perception and recollection to the jury under appropriate instructions.

Use of James' Prior Statement

Defendant argues that it was error to allow the prosecutor to read portions of a statement made by James to Detective Gatto on January 23, 1973 because James stated he could not remember making the statement and it was not inconsistent with his testimony at trial. Defendant argues that such use denied him his right to confront witnesses against him.

James testified that he heard Marshall make a noise when he was shot. James was then asked "You indicate that you do not recall the statement concerning shooting Marshall was like shooting a dog or cat." James answered that he did not remember making such a statement or any statement on January 23, 1973 to Detective Gatto. After Detective Gatto testified to taking James' statement, James was again asked the same question and when queried if this was his "recollection" responded "I guess."[2]

Generally, "the testimony of a witness that he does not remember an event is not 'inconsistent' with a prior statement by him describing that event." (People v. Green, 3 Cal.3d 981, 988-989 [cert. den., 404 U.S. 801]; People v. Sam, 71 Cal.2d 194, 208-

[2]On the other occasions when the prosecutor asked James if he had made particular pretrial statements he testified that he remembered making them.

210.) However, "[i]nconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness." (People v. Green, supra; see People v. Wheeler, 23 Cal.App.3d 290, 309.) In the present case James testified to the events leading up to and following the killing of Marshall. When asked the question which is under discussion James became vague and equivocal, asserting that he no longer remembered. Under these circumstances the jury could properly disbelive James' claim that he no longer remembered. (People v. Green, supra, at p. 987.) Accordingly, the prior statement of James was properly admitted pursuant to Evidence Code section 1235 which provides for the admission of a prior inconsistent statement.

It is the rule that if a witness either denies, acknowledges or qualifies the truth of a prior statement, such statement may be introduced without violating the confrontation clause. (Nelson v. O'Neil, 402 U.S. 622, 629-630; People v. Jenkins, 34 Cal.App.3d 893, 898. We observe that in the present case the first question asked by defense counsel was: "Mr. James, is there a story that you're supposed to be telling here that you have a hard time remembering?" The witness answered in the affirmative, thus qualifying the truth of his prior statement.

We note, further, that James was subject to full cross-examination. Under these circumstances the receipt of his pretrial statements did not violate defendant's Sixth Amendment right of confrontation.

(People v. Cannady, 8 Cal.3d 379, 387; see California v. Green, 399 U.S. 149, 158, 161.

Motion for Change of Venue

Defendant contends that the trial court erred in denying his motion for a change of venue and that such denial denied him a fair trial by an impartial jury. The basis of the motion was that the crimes charged against defendant received wide publicity over the entire County of Humboldt; that such publicity depicted defendant as a fugitive; that after the preliminary hearing the news media gave wide publicity to the testimony of James who named defendant as the killer of Marshall and recounted a bizarre story of an execution-like slaying; that Humboldt County has a small population, having approximately 104,00 residents; that the news media and word-of-mouth repetition of the sensational and callous aspects of the alleged crime created a county-wide feeling of animosity and prejudice against defendant; that defendant is an Indian and there is prejudice against Indians in Humboldt County.

The motion was supported by the affidavit of defendant and that of his attorney, Robert C. Dunn. Defendant's affidavit merely states that he believes he cannot receive a fair trial in Humboldt County or any adjacent county because of the publicity given his arrest and the subsequent legal proceedings. Dunn's affidavit states that the publicity regarding the murder of Marshall was widespread and gave the impression that defendant took flight and concealed

himself after the murder to escape capture and prosecution; that James' testimony at the preliminary hearing "covered the alleged crime from beginning to end" and described defendant as a killer who executed Marshall in cold blood; that the Dowd brothers testified before the Grand Jury to the same effect; that defendant "faced a community situation where most knowledgeable persons seem to have a knowledge of the crime alleged and the facts involved"; and that "from such observations, I do not believe that this Defendant can receive a fair and unprejudiced trial in Humboldt County, or any adjacent county".

In denying the motion the trial court stated as follows: ". . . that the publicity given to the crime has not been sensational to the point of being overwhelming. In fact, there has been nothing reported in the past four or five months, and there has been no publication of statements by defendant." Defendant did not seek relief by petition for writ of mandate nor did he renew his motion during or after the *voir dire* of the venireman.

The applicable principles are stated in *People v. Welch,* 8 Cal.3d 106, 113 as follows: "'A change of venue must be granted when the defendant shows "a reasonable likelihood that in the absence of such relief, a fair trial cannot be had.'" [Citations.] And it is the duty of the reviewing court to make an independent evaluation of the circumstances and to satisfy itself de novo that the defendant obtains a fair and impartial trial. [Citations.]"

In the instant case defendant failed in his motion for change of venue to establish a reasonable likelihood that he could not have a fair trial in Humboldt County. The only evidence presented in support of the motion was in the form of Dunn's affidavit. This affidavit did not present any facts but merely the opinion and conclusions of the affiant. The nature, frequency or content of the alleged pretrial publicity was not shown. No showing was made that the alleged publicity was other than ordinary news coverage. The trial judge found that the publicity complained of was last reported some four to five months prior to the determination of the motion for change of venue.

We observe that the first attempt to make any factual allegations is by statements in defendant's opening brief which we may not consider since they are dehors the record. We do point out, however, that the allegations made in the brief are essentially argumentative and conclusionary rather than factual. The thrust of defendant's argument appears to be that Humboldt County has a small population, i.e., 104,892 persons. Population size alone is not determinative. (People v. Fain, 2 Cal.3d 46, 52, fn. 1.) It is merely a factor to be considered. (People v. Fain, supra.)

We observe further that no contention is made that on the *voir dire* examination of the jurors selected to serve that any of them had read or heard of any of the pretrial publicity or that any of them were biased or prejudiced by reason of such publicity.

Nor is any contention made that any of the jurors had indicated at *voir dire* that he or she had formed an opinion as to the guilt or innocence of defendant or that any of them had indicated that they could not act fairly or impartially. Defendant accepted the jurors without exhausting his peremptory challenges and he exercised no peremptory challenges at all in the selection of the two alternate jurors.

Under the circumstances the court did not err in denying the motion for a change of venue. Moreover, upon an independent evaluation of the circumstances we are satisfied that defendant was not precluded from receiving a fair and impartial trial by reason of any pretrial publicity. (See Maine v. Superior Court, 68 Cal.2d 375, 383.) The assertion that there is evidence that the jury received evidence outside of court and that the Dowd brothers were harassed in halls of the courthouse during trial, absent any showing that such conduct resulted from pretrial publicity, is not indicative of a reasonable likelihood that pretrial publicity prevented defendant from receiving a fair trial.

Electron Microprobe Test

The prosecution introduced evidence to the effect that two human hairs, which were found on a headband at Tish Tang Road where the liquor was discovered, might be those of defendant. The evidence was introduced through the testimony of a Federal Bureau of Investigation technician who related the results of a microscopic examination of the hairs he tested in February of 1973.

The defense called a criminalist, Kenneth Parker, to give expert testimony concerning various tests which he performed on the hairs. Specifically, he performed (or supervised the performance) of three tests, the first of which was a microscopic examination of the hairs, similar to the test performed by the prosecution expert. The second test, involving the use of a scanning electron microscope (SEM) to greatly magnify the image of the hair sample, was performed by technicians at the General Electric Nuclear Technology Laboratory in Pleasanton, California. The third test, referred to by Parker as an electron microprobe test (EMP), was performed by General Electric technicians at Parker's request at the Pleasanton laboratory.

The trial court admitted evidence of the microscope test and "SEM" test but refused to admit evidence of the "EMP" test. With respect to the latter test Parker testified that "it's not generally accepted by the scientific community." He further testified, "There are severe limitations associated with it which we are aware of and satisfied with. However, I'm only one scientist and with GE personnel is one group." Parker also testified that to his knowledge evidence relating to the electron microprobe test had never before been introduced in a court of law, and that neither he nor the technicians at General Electric who had actually conducted the test had ever done so before, although some of the procedures, i.e., ionization measurements, used in the test had been previously utilized.

"The test for the admissibility of scientific testing is whether or not it has received general acceptance by recognized experts in the field." (Hodo v. Superior Court, 30 Cal.App.3d 778, 784. See also People v. Collins, 68 Cal.2d 319, 332; Huntington v. Crowley, 64 Cal.2d 647, 653.) "The determination of whether a scientific test has received general acceptance by recognized experts in the field so as to justify the admission of expert testimony based on the results of the test is primarily a question of fact for the trial court." (People v. King, 266 Cal.App.2d 437, 443.) This determination will not be disturbed on appeal unless a manifest abuse of discretion is shown. (Hodo v. Superior Court, supra, at pp. 784-785; People v. King, supra.) Here there was evidence that the subject test had not received general acceptance by recognized experts in the field. Under these circumstances there was no abuse of discretion in ruling that the test was inadmissible.

Testimony of Accomplices

Defendant asserts that he was convicted solely on the uncorroborated testimony of three accomplices, i.e., James and the two Dowd brothers. Penal Code section 1111 provides that "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense: and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." The corroborating evidence need only be slight but it must relate to some act or fact which is an element of the crime. *People v. Hathcock,* 8 Cal.3d 599, 617; People v. Perry, 7 Cal.3d 756, 769.)

Assuming, arguendo, that James and the Dowd brothers are regarded as accomplices there is ample independent evidence which tends, without aid or assistance from the testimony of the accomplices, to connect defendant with the crime charged. The record discloses that on the evening of January 22, 1972, at a time when the police were looking for defendant, he went to the trailer of his friend Daniel Colegrove. Defendant at that time informed Colegrove that he had been present when Marshall was shot. This statement tends to connect defendant with the commission of the offense within the meaning of Penal Code section 1111. (See People v. Hathcock, supra, 8 Cal.3d 599, 617; People v. Perry, supra, 7 Cal.3d 756, 769.) It is an established principle that statements of the defendant may be used to corroborate the testimony of an accomplice. (People v. Kramer, 259 Cal.App.2d 452, 462; People v. Reinard, 220 Cal.App.2d 720, 728.)

Instruction on Felony-Murder Rule

Defendant argues that it was error to give an instruction on the felony-murder rule because the res gestae of the felony of burglary had been completed at the time of the homicide. The trial court gave the

standard burglary instruction in the form of CALJIC 14.50.[3] The court also instructed as follows: "However, all of the acts performed by the burglar immediately after the entry of the building which follow in one continuous transaction, including the acts of fleeing with the fruits of the burglary to a place of temporary safety, and the acts done in the same continuous transaction to protect against the discovery of said burglary are all an integral party of the crime of burglary." With particular regard to the felony-murder rule the court instructed as follows: "If a human being is killed by any one of several persons engaged in the perpetration—perpetration of or an attempt to perpetrate the crime of burglary, all persons who either directly or actively commit the act constituting such crime or who knowingly and with criminal intent aid and abet in its commission, or whether present or not who advise and encourage its commission, are guilty of murder of the first degree, whether said killing is intentional, unintentional or accidental."

In the application of the felony-murder rule the test is whether the killing and the felony are parts of one continuous transaction. (People v. Salas, 7 Cal.3d 812, 821-825 [cert. den., 411 U.S. 939]; People

[3]The court instructed: "Every person who enters any structure of a type shown by the evidence in this case with the specific intent to steal, take away—steal, take and carry away the personal property of another of any value with the specific intent to deprive the owner permanently of his personal property, is guilty of burglary. The essence of a burglary is entering such a place with such specific intent and the crime of burglary is completed as soon as the entry is made, regardless of whether the intent thereafter is carried out."

v. Mason, 54 Cal.2d 164, 169; People v. Chavez, 37 Cal.2d 656, 669-670; People v. Boss, 210 Cal. 245, 252-253; People v. Miller, 121 Cal. 343, 345.) With respect to the underlying felony of burglary the felony-murder rule is not rendered inapplicable because the killing occurs after the entry or breaking into a building upon the rationale that the crime of burglary is held to be completed upon such entry or breaking. (People v. Boss, supra, p. 252.) In *Boss* the court stated that the felony-murder rule ". . . was adopted to make punishment of this class of crime [burglary] more certain. It was not intended to relieve the wrongdoer from any probable consequences of his act by placing a limitation upon the *res gestae* which is unreasonable or unnatural." (At pp. 252-253.) (See People v. Mason, supra, at p. 169.) In *Chavez,* supra, we find this pertinent statement: "The law of this state has never required proof of a strict causal relationship between the felony and the homicide. The statute was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker, and this court has viewed it as obviating the necessity for, rather than requiring, any technical inquiry concerning whether there has been a completion, abandonment, or desistance of the felony before the homicide was completed." (At pp. 669-670.) (See People v. Mason, supra, at pp. 168-169.)

In *Mason* there was evidence that the defendant entered a house with the intent to commit an assault upon Rona Porazzo, that he remained in the house

for 20 hours, and then, in an exchange of shots, killed Rona's mother. It was held that the court did not err in instructing the jury that murder committed in the perpetration of burglary is murder in the first degree since under the evidence the homicide and burglary were acts of one continuous transaction. (54 Cal.2d at p. 169.) In *Miller* the defendant pursued a person whom he was attempting to kill into a house of another person whom the defendant killed when that person interrupted the pursuit. This evidence was held sufficient to justify an instruction upon the subject of murder committed in the attempt to commit burglary upon the basis that all of the acts were part of one continuous transaction. (121 Cal. at p. 345-346.)

Analogy is found is the felony-murder rule cases involving robbery as the underlying felony. In *People v. Rye,* 33 Cal.2d 688, 693, the robberies took place a considerable time before the fatal beating was administered for the purpose of preventing discovery of the previously committed robberies. The homicide was held to be murder in the first degree because it occurred during a "continuous integrated attempt to successfully escape after the perpetration of the robberies." In *People v. Kendrick,* 56 Cal.2d 71, 90, the killing occurred about 48 minutes after the robbery victim had first been accosted by the defendant when a police officer stopped the defendant for a traffic violation. The defendant shot and killed the police officer. The Supreme Court held that instructions on the felony-murder rule were properly given stating,

"The homicide, committed as it was while defendant was in hot flight with the stolen property and in the belief that the officer was about to arrest him for the robbery, falls well within this rule." In *Salas,* 7 Cal. 3d 812, the rule was held applicable where an officer, who commenced to follow the defendant within three minutes after a robbery, was killed within six or seven minutes of that time. The Supreme Court concluded that the robbery was still in the "escape stage" and was committed while the defendant "'was in hot flight with the stolen property and in the belief that the officer was about to arrest him for the robbery.'" (7 Cal.3d at p. 823; see People v. Ketchel, 59 Cal.2d 503, 524, disapproved on other grounds in People v. Morse, 60 Cal.2d 631, 637, 649.)[4]

In the present case there was evidence that defendant committed a burglary in the premises of the Club Hupa for the purpose of committing a theft of liquor; that the liquor was placed in a car; that Marshall, the janitor of the club, was ordered into the car; that defendant and his companions drove to an isolated area; that Marshall was shot by defendant while walking down a "log skid road;" that defendant stated he had killed Marshall to prevent him from going to the police; and that then defendant and his companions drove to another location where the stolen liquor was hidden in the brush. Under these circumstances the burglary and the homicide were parts of one continuous transaction. Defendant was

[4]In *Salas* it is noted that "The fact that a robber has not won his way to a 'place of temporary safety' can only mean that he is still fleeing, still trying to escape." (7 Cal.3d at p. 822.)

in hot flight with the stolen property and killed Marshall for the purpose of preventing discovery of the previously committed burglary. Accordingly, the instructions on the felony-murder rule were properly given.

There is no merit to defendant's contention that the felony-murder instructions rendered the instructions on diminished capacity useless. We perceive this contention to be based on the claimed error with respect to the giving of the felony-murder instructions. Suffice it to say, since there was no error in the giving of the felony-murder instructions the diminished capacity instructions were not rendered useless but were properly given with respect to whether or not defendant entertained the specific intent requisite for the commission of the underlying felony of burglary.

Jury Misconduct

As a ground for a new trial defendant urged that the jury was guilty of misconduct. In support of this ground defendant presented affidavits by three jurors and, additionally, the testimony of one of these jurors. Juror Hooker declared that during the trial she was approached by a male person whose name is not known to her. This person ventured an opinion that defendant was guilty and that it was common knowledge among the school children of the Hoopa area that defendant "had acknowledged his responsibility." Juror Hooker declared that at no time did she discuss the content of this communication with any member of the jury during the trial or during the jury

deliberation, and that she in no manner deemed the information imparted to her by the male who approached her as admissible evidence to be considered by her in her deliberations, as she was mindful of the court's admonition to disregard all information except that received in court during the trial. Juror Hooker stated further that at the conclusion of the jury deliberation and following the signing of the verdict form she stated audibly, "Well, I did hear something in Hoopa which could affect this trial."

Juror Lemstrom, the foreman of the jury, declared that at the conclusion of the jury deliberations Juror Hooker "advised that she had received a communication" but that at no time was said communication a part of the jury deliberation nor was said communication discussed in detail by any member of the jury prior to the rendition or recordation of the verdicts. Lemstrom stated, further, that the verdicts returned were based solely on evidence received during the course of courtroom presentation.

Juror Kinones declared that he heard Juror Hooker state in his presence that she knew "something other than what had been received by this jury" and that this statement was made as he was putting on his coat to leave the jury room and the courthouse after the jury had reached its verdicts and the verdicts had been filed and recorded. Kinones stated that at no time did Juror Hooker's comment serve as an item for discussion prior to arrival at verdicts and that all deliberations had ceased when Juror Hooker made her comment. The substance of Kinones' decla-

ration was orally reiterated by him during testimony presented at the hearing of the motion for a new trial.

"An allegation of jury misconduct raised on a motion for new trial presents a question of fact for the trial court." (People v. Orchard, 17 Cal.App.3d 568, 574.) "A motion for new trial is, . . . addressed to the trial court's judicial discretion, and its action will not be disturbed on appeal unless that discretion is clearly and unmistakably [sic] abused." (People v. Lyons, 18 Cal.App.3d 760, 778.)

"Affidavits of jurors may be used to impeach their verdict only in certain limited situations. Such affidavits may be used to show that the verdict was reached by lot or chance and to show that one or more of the jurors concealed bias or prejudice on *voir dire*." (Putensen v. Clay Adams, Inc., 12 Cal.App.3d 1062, 1082; see Continental Dairy Equip. Co. v. Lawrence, 17 Cal.App.3d 378, 386; Carlson, Collins, Gordon & Bold v. Banducci, 257 Cal.App.2d 212, 229.) A verdict may also be impeached on the bases of improper influences that are open to sight, hearing, and the senses and thus subject to corroboration, but may not be impeached by affidavits whose effect is to prove the subjective processes of the juror. (Evid. Code § 1150;[5] People v. Hutchinson, 71 Cal.

[5]Section 1150 of the Evidence Code provides: "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined. (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict."

2d 342, 349-350; People v. Orchard, supra, 17 Cal. App.3d 568, 573; Putensen v. Clay Adams, Inc., supra, p. 1083.)

In the present case the evidence presented by the affidavits and testimony of the jurors was admissible since it was indicative of improper influences that were open to sight, hearing and the senses and thus subject to corroboration. It was of such a character as is likely to have influenced the verdict improperly. However, we cannot state that as a matter of law the verdict was influenced either by the communication allegedly made to Juror Hooker or her statement to the other jurors. Juror Hooker stated that she did not communicate the nature or substance of the communication made to her to the other jurors at any time and that the statement that a communication had been made to her was made to the other jurors after the jury's deliberations and the return of the jury's verdicts. Her declaration with respect to communication with her fellow jurors was substantially corroborated by the affidavits of Jurors Lemstrom and Kinones and the testimony of Kinones. Accordingly, the determination whether the communications under discussion improperly influenced the verdict was a factual one for the trial judge and his determination will not be disturbed by us because we cannot say that under the factual presentation his judicial discretion was abused.

Suppression of Evidence

At the hearing on the motion for new trial defendant presented four witnesses in support of his contention that during the course of the trial the District Attorney had wilfully suppressed evidence. The gist of this testimony was that during the trial and after his testimony in the case, Milton Dowd was stopped for a traffic offense by sheriff's deputies and during an ensuing search an undetermined quantity of marijuana was found under the seat of the car. Defendant was not arrested for or charged with possessing marijuana. He was only given a traffic citation. It was defendant's contention that the District Attorney deliberately suppressed this occurrence and that, as argued by defendant's counsel, it was "evidence that we should have had available to us to go back over and cross-examine the Dowd boy involved so the question of his veracity in telling the story that he did could have been examined. . . ."

The materiality of the evidence purportedly suppressed is unclear. The trial judge's remarks at the hearing on the motion for new trial indicated that there was testimony before the jury that marijuana was used by defendant and his companions on the night of the burglary, kidnapping and the homicide, and that a marijuana cigarette was passed among the persons in the automobile. The trial judge stated: "The court feels that all of these points were covered during the trial . . . ."

It appears, therefore, that the trial court considered that the evidence that marijuana was found in

a vehicle driven by Dowd, if admissible at all, would have been cumulative. Moreover, no showing was made that the District Attorney or any of the members of his staff was aware of the traffic incident involving Dowd. Under all these circumstances the court did not abuse its discretion in denying the motion for new trial on the basis that evidence was suppressed by the District Attorney.

The judgment is affirmed.

Molinari, P.J.

We Concur:

Sims, J.

Elkington, J.

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

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1 Crim. No. 13249
(Sup. Ct. No. 7075)

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

RITCHIE LEE BLAKE,
Defendant and Appellant.

[Filed Nov. 13, 1975]

BY THE COURT:

Good cause appearing therefor, the opinion heretofore filed in the above entitled case is modified of record as follows:

Delete the words "District Attorney" on page 27, line 20, on page 28, line 3, and on page 29, line 1, and substitute in lieu thereof the words "sheriff's deputies."

The petition for rehearing is denied.

Molinari, P.J.